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Supreme Court of the United States

OCTOBER TERM, 1961

No. 919

JEANETTE E. GONDECK, Intervenor,

Petitioner,

vs.

PAN AMERICAN WORLD AIRWAYS, INCORPORATED and THE TRAVELERS INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I

THE QUESTIONS

In this case there are no special nor important nor substantial reasons for certiorari.

Petitioner asseverates there are, however, and proposes three strawmen in h[illegible] "Questions Presented". We cannot agree that those straw questions are the questions in this case.

The first two questions (which as put by Petitioner are distortions and omissions) are comprehended, we suggest without partiality to either side, by this question which we put to the Court below as the controlling question in this case (see our Brief below at page 13):

> "The question at bar is whether an employee hired to work out of the United States on a Bahama island who is injured (and dies) when a jeep overturned in which he was a passenger while away from the employer's premises on a private (i.e. not employer sponsored or aided) recreational trip of his own has suffered an injury 'arising out of and in the course of employment'. [33 U.S.C.A. Sec. 902(2)]"

Or, if a different formulation be preferred, the question might be phrased by putting the following West Syllabus to this case in interrogative form: See 299 F.2d at 74, Syllabus 5:

> "Where diesel generator operator at defense base in British West Indies was subject to call for emergencies when off duty, there was recreation center on base, employer transported employees without charge by bus to town and employees were prohibited from using jeep for recreation purposes, death of operator while returning in jeep from native club in town where he had had a beer after working hours did not arise out of or in the course of employment and hence was not compensable. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et

seq., 33 U.S.C.A. Sec. 901 et seq.; 42 U.S.C.A. Sec. 1651 et seq."

The third question put by Petitioner is not only a distortion and omission but a peculiar turnabout.

For it was the Petitioner who argued to the Court below that the Administrative Procedure Act had nothing to do with this case at all; that the Deputy Commissioner's inferences are: "unreviewable" (Gondeck Brief below, page 13), "are not judicially reviewable" (ibid); etc. And it was we who pointed out the law now stated by Petitioner to be correct and applicable.

And so it was that the Court below said: See Opinion at A. 7 of Petitioner's Petition here:

> "The Intervenor-Appellant asserts that 'In the absence of a finding that Gondeck was injured and killed within the terms of Section 903(b), the award must be reinstated.' This is not an accurate statement, at least since the passage of the Administrative Procedure Act, of the principle governing a judicial review of an administrative determination. The findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 740, 95 L. Ed. 483; Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456. ***"

And so it is that, and quite contrary to Petitioner's question, West Syllabus Note 4 reads:

"Deputy Commissioner's findings, in compensation case, are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. Longshoremen's and Harbor Workers' Compensation Act, Sec. 1 et seq., 33 U.S.C.A. Sec. 901 et seq.; Administrative Procedure Act, Secs. 1-12, 5 U.S.C.A. Sec. 1001-1011."

II

REASONS FOR GRANTING THE WRIT

The above is another of Petitioner's captions.

The first reason advanced is "because the beneficial provisions of the compensation laws were disregarded and the intent of Congress misapprehended when it was held that Frank J. Gondeck's death was not a consequence of his employment". This of course is sheer *ipse dixit* and not a reason but a conclusion. No more need be said on that.

The second reason advanced is that the Court of Appeals for the Fifth Circuit is in conflict with the opinions of this Court and other Courts of Appeal. There is no conflict and in our Brief below we challenged Petitioner then to submit a reported federal case holding compensable an injury suffered while engaged in private (i.e., non-employer sponsored or aided) recreational activity. There isn't any. In truth the only reported federal decision on point is squarely with us: **Brown-Pacific-Maxon, Inc. v. Pillsbury**, 132 F.S. 421 (D.C. Calif. S.D. 1953).

Attached to that second reason is another: that the

Court of Appeals for the Fifth Circuit is holding that the employer must receive some tangible benefit as contrasted to improvement of work or moral. The Court did not so require. Instead what the Court was talking about was that factor together with other factors. This will more plainly appear later and is obvious from the face of the opinion.

The third reason is that the Court of Appeals for the Fifth Circuit "departed from the opinions of this court and other courts of appeal by setting aside an award of compensation for death suffered by defense base worker while returning to base in a company vehicle". That of course is not the fact in this case. The fact in this case is as the Court of Appeals stated:

> "He had not been using recreational facilities furnished by the employer nor did he use the means of travel to and from the place of recreation furnished by the employer." (A. 8-9)

The fourth reason is that the Court of Appeals for the Fifth Circuit "has penalized the widow and minor child of a deceased defense base worker for the violation of a company rule by another worker without the decedent's fault". Again that is not the holding below nor the facts in this case. The holding below is that:

> " *** We do not think it can be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base. If such sponsorship could be inferred it would not inhere in an expedition made in the employer's

> jeep which the employees were prohibited from using for such purposes. ***" (A. 8)

The fifth reason is that the Court of Appeals for the Fifth Circuit "has misapprehended the scope of judicial review permitted in the Administrative Procedure Act and has expanded the judicial authority." We have already pointed out that this represents a most peculiar turnabout on the part of the Petitioner who argued below that the Administrative Procedure Act had nothing to do with this case at all, etc. Of course the Court did not do what Petitioner says it did.

We note that the Petitioner has omitted as an appendix the stipulated facts upon which the Deputy based his Order.

We have therefore attached as an Appendix to this Brief the Stipulation.

It cannot be too strongly emphasized in this connection that, as the Court of Appeals pointed out but did not dwell particularly on, the evidentiary facts were stipulated and it was the Deputy Commissioner's inferences and legal conclusions drawn from those facts that were reviewed. When Petitioner states that the facts ". . . are adequately summarized by the Court of Appeals, and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4) it becomes apparent that we are dealing with questions of law and the point about misapprehending the scope of judicial review is just talk.

We will go into this more when we treat the particular points that the Petitioner makes.

POINT I

We are using Petitioner's captions. Under this particular head the Petitioner makes the argument that reasonable recreation is an incident of civilian employment at a United States Military Base in a foreign land, citing the **O'Leary v. Brown-Pacific-Maxon** decision of this Court and other decisions.

But **O'Leary** held only that the employer had made reasonable recreation an incident of the employment at the defense base and turned largely on the "zone of special danger" that had been created or allowed to come to pass by the employer in that case. **O'Leary** has always struck us as being very much akin to a mother locking her children in the back yard where there is a swimming pool, telling the children not to go in, then going downtown shopping, and being much surprised when on her return home she finds that the children have gone into the pool and drowned.

The other cases cited by Petitioner are all cases dealing with injuries that occurred while the employee was using employer provided or sponsored recreational facilities or employer provided or sponsored transportation. We quarrel with none of them. They are inapplicable to the case at bar.

Taking the cases one by one as they are cited by the Petitioner:

In **Hastorf-Nettles**, the employee was returning to camp **in the employer provided truck** when the accident occurred in which he was injured.

In the **Lytle Co. v. Whipple** case the employee was returning to his barracks **in the company truck** when he was killed and the Court cited the next following case, **Liberty Mutual Ins. Co. v. Gray** in support of its holding. We have no quarrel with any of these cases.

In **Liberty Mutual Ins. Co. v. Gray**, compensation liability had attached with the **employer provided transportation:** the employee was on his way back to his construction camp on Oahu in a truck provided by the employer to transport employees from Honolulu to the camp.

Turner v. Willard involved an injured claimant who was a captain of one of the bowling leagues organized by and sponsored by the employer. **He was on bowling league business.**

Travelers Insurance Company v. O'Hearn is an unreported case. We consider the citation of an unreported case to be entirely improper because there obviously is no report to examine. The same comment is applicable to the other **Travelers Insurance Company v. O'Hearn case.**

The State cases that are cited by Petitioner are: **Lamm v. Silver Falls Timber Co.**, which involved a logger who had finished his recreation and was on the defendant's logging railroad going

back to camp—**the transportation being furnished by the employer**—when the accident occurred. We have no quarrel with this case nor with any of these cases which hold as the rule that when an employer provides transportation the compensation liability commences with the transportation.

The **Gabumas** case and the **Lewis** case are both unusual cases entirely apart from the case at bar which might best be summed up by what the New York Court of Appeals said in **Lewis:**

"* * * Here Lewis was sent by his employer to a country where there had been warfare for a long time and where an uneasy truce was in effect."

In fact, if **Larson** on **Workmen's Compensation** will be examined at Sec. 25.00 et seq. a number of traveling employee cases will be found with various and sundry **ratio decidendi.** Some of these New York cases might be considered to award compensation because of the "strange customs" and "abnormal conditions" of travel in a foreign land but it is obvious they have no light to shed on our case.

Petitioner suggests at page 7 of her Brief that "In analogous situations, such as actions for seamen's maintenance and cure, injuries suffered during shore leave have been held by this Court to be within the scope of employment."

That statement and citation of two Jones Act cases

dealing with maintenance and cure surprise us, as well as the suggestion that the Jones Act situations are "analogous". Maintenance and cure has certain limitations not applicable to Workmen's Compensation—as for example the fact that maintenance and cure is not paid throughout a "permanent and total disability"—and again maintenance and cure in itself is an old maritime doctrine.

For the suggestion to be made that situations are analogous that date back to the "Laws of Oleron" and the saga of the seas and the doctrine of seamen being wards, is demonstration of an **in extremis** argument.

Congress could have so provided but in fact Congress did not. The Federal Longshoremen's and Harbor Workers' Act is a complete and well thought out entity in and of itself providing for compensation under specific and particular conditions. The Federal Longshoremen's and Harbor Workers' Act was made applicable to defense bases and to the employment in the case at bar by the Defense Bases Compensation Act, 42 U.S.C. Sec. 1651 et seq. Had Congress wished a wider coverage to be given under the Act to employees at defense bases, had Congress considered, as the Petitioner would have this Court believe, that it "intended" a wider coverage, then of course Congress could have provided the wider coverage but Congress did not.

For example, Congress provided the wider coverage under the Federal Employees Compensation Act—5 U.S.C. Sec. 51 et seq.--by saying in 42 U.S.C. Sec. 1701 "and such injury proximately results from a war risk hazard, whether or not such person in actuality was engaged in the course of his employment". Congress again widened

the coverage in this very Defense Bases Compensation Act with respect to injuries received during transportation to and from the place of employment by saying in 42 U.S.C. Sec 1651(a)(4) that coverage "shall include any injury or death occurring to any such employee during the transportation to and from his place of employment, where the employer or the United States provides the transportation or the cost thereof".

The fact is therefore that Congress did not in its Defense Bases Compensation Act broaden the scope of the coverage of the Federal Longshoremen's and Harbor Workers' Act except in the one particular just above noted.

Petitioner then contends that the Fifth Circuit is in conflict with **O'Leary** because the Fifth Circuit said, inter alia, that no benefit to the employer had been shown.

If, however, the opinion of the Fifth Circuit will be read it will be found that the Court was saying that no matter how hard it looked it could not find any evidence to furnish a link "by which the activity in which Gondeck was engaged was related to his employment". The Court was not laying down a rule that there must be benefit to the employer; the Court was trying to find if there was any possible link between the employment and the injury.

Petitioner then argues that there is a presumption of coverage. Of course a presumption of coverage does not have the quality of independent affirmative evidence —see **John W. McGrath Corp. v. Hughes**, 264 F.2d 314 (C.A.2d 1959) and this is merely a makeweight.

We have no argument whatever with the espousal by the Petitioner of the doctrine of liberal interpretation of the Federal Longshoremen's and Harbor Workers' Compensation Act. We agree that that Act is to be liberally construed in favor of the employee. To go from the doctrine of liberal construction, however, to the abolition of there being a link between the employment and the injury is stretching the elasticity of interpretation beyond the breaking point.

POINT II

Under this head the Petitioner states that the "Deputy Commissioner properly rejected outmoded common law conceptions of scope of employment and held the decedent was injured within a zone of special danger".

Unfortunately for Petitioner's contention, there were no such findings by the Deputy. The Deputy did not say that he was rejecting outmoded common law conceptions nor did he hold that decedent was injured within a zone of special danger. The Deputy's opinion may be read from beginning to end without finding any such conclusion as this.

We agree of course that under the Federal Longshoremen's and Harbor Workers' Compensation Act a common law conception of scope of employment is not applicable. The requirement under the Act is that the injury must be one "arising out of and in the course of employment". The Fifth Circuit did not go off into what Petitioner says. What the Fifth Circuit did was to say that it could find no "link by which the activity in which Gondeck was engaged was related to his employment". That is no common

law conception but rather straightforward application of modern compensation law.

The assertion by the Petitioner that: "The doctrine of 'zone of special danger' has been discarded by the Fifth Circuit" is of a piece with the other stretchers made by Petitioner. There just wasn't any 'zone of special danger'.

POINT III

Under this head are the arguments previously made by the Petitioner with, however, the assertion that had Gondeck gone in to town by bus and hitched a ride back he would have been covered. That is not what the Fifth Circuit said nor is it correct. In addition, Petitioner makes the following statement which has no support whatever in any part of the Record and the source of which is a mystery to us: "The company rules permit employees to hitch back from town." We know of no rule, we know of no issue in connection with such an assertion, there is no such factor in this case.

POINT IV

Under this head the argument is made that the Deputy properly refused to penalize the Claimant for violation of a non-communicated unenforced company rule. This contention, repeated a number of times, is entirely beside the point in this case.

As was said in our Brief below, the District Court did not reverse the Deputy on the ground that the decedent was violating company regulations by using the jeep—and we have no quarrel with the rule stated by

the Petitioner that employees should not and must not be denied compensation for violation of uncommunicated unenforced company rules—and the fact is that we have said this repeatedly and over and over again—and the fact is that Petitioner continues to make the same argument over and over again.

What happened was that the District Judge stated that the recreational trip could hardly be said to be employer sponsored or employer approved or arising out of or in the course of employment when the jeep itself was not permitted to be so used. And that is as far as this matter went. It did not go to the point of denying compensation because of violation of company rules.

Nor did the Fifth Circuit do what Petitioner claims it did. All that the Fifth Circuit said was that it did not think it could be said that the employer sponsored the activity of going to Cockburn Town for recreation because it furnished free bus service between the town and the base; and that if such sponsorship could be inferred, it would not inhere in an expedition made in the employer's jeep which the employees were prohibited from using for such purpose. The West syllabi are proof enough of what the Court said as contrasted to what Petitioner says it said.

POINT V

When Petitioner under this head states:

"Presumably, the Court of Appeals would have reinstated the compensation award except that

> it conceived that under the Act it had authority to reweigh the evidence. . . . "

this is another of the sheer gratuities paid to the Fifth Circuit by the Petitioner. The Court had no such idea. The Court did no such thing. The Court did not, as Petitioner claims it did, widen the scope of judicial review.

It is an odd turnabout as we have previously noted: and the facts were all stipulated: but more significantly what sense is there to a contention about reweighing evidence when Petitioner concedes that the facts in this case " . . . are adequately summarized by the Court of Appeals and the Court's statement from its opinion is accepted as the statement of the case . . . " (Petition at p. 4)

CONCLUSION

Actually, due to the stipulated facts in this case, the question essentially was sheerly one of law and on that question the Fifth Circuit Court of Appeals properly ruled, under the stipulated facts, that the injury and death of Gondeck were wholly disassociated from his employment and that there was no evidence to furnish a link by which the activity in which the decedent was engaged was related to his employment. He was at the time engaged in a private — not employer sponsored and not employer aided — recreational trip of his own which was purely personal to him and the risks that he incurred were again purely personal to him and not arising out of the employment.

The issue in these cases is "Is the risk personal or employment related?" That is what was decided here, on stipulated facts. The Deputy's finding was not only unsupported by substantial evidence on the record considered as a whole but there was no evidence to support it. And, more significantly, the question, essentially, was one of law which again had only one answer.

We therefore respectfully submit that in this case there is no important, special, or substantial reason for certiorari.

We might observe that the only reported federal decision dealing with this specific situation is a District Court decision in **Brown-Pacific-Maxon, Inc. v. Pillsbury,** 132 F.S. 421 (D.C. Calif. S. D. 1953) in which virtually the same fact situation was held by the District Judge to result in non-compensability.

Respectfully submitted, this
_____ day of May, 1962.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari were mailed to Arthur Roth, Esq., 1111 Ainsley Building, Miami 32, Florida, and Norman Miller, Esq., 20 S. E. First Avenue, Miami 32, Florida, this _____ day of May, 1962.

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APPENDIX

(This Stipulation of Facts may be found in the Transcript of Record at p. 7-13)

STIPULATION OF FACTS

1. Pan American World Airways, Inc., contracted with the United States Government to staff the non-military portions of certain of the United States Guided Missile Tracking Bases with civilian employees.

2. The deceased, FRANK J. GONDECK, a resident of Florida, was employed by Pan American World Airways, Inc., in March, 1958, to work on San Salvador Island, B.W.I., as a diesel generator operator. The terms of his employment required him to report to Patrick Air Force Base, near Cocoa, Florida, and be transported by air, at his employer's expense, to San Salvador Island, B.W.I., where he was to remain for forty-five (45) days. He was then to be returned to Patrick Air Force Base, at the expense of his employer, and receive a seven-day leave. Thereafter, he was again to report to Patrick Air Force Base, be transported to San Salvador Island to work another forty-five (45) days and receive another seven-day leave, as before. The same procedure was to be followed thereafter, except that the work periods were to be for three (3) months and the leave periods to be fourteen (14) days. His remuneration included a 30% bonus for working overseas, and periodic raises were contemplated in the future.

3. FRANK J. GONDECK'S duties were to operate the diesel engines generating electricity in the power-

house. He worked eight (8) hours, then was off twenty-four (24) hours, but was subject to call in the event of an emergency. His salary was $513.00 a month, which included a 30% overseas bonus.

4. The employer furnished transportation from and to Patrick Air Force Base, housing facilities, board and laundry, and transportation on the Island.

5. Such transportation as might be needed on the Island was supplied by a Pan American motor bus operated by a Pan American bus driver on a regular schedule from the Base to the town, at no charge.

6. The housing facilities consisted of a room in a dormitory, each room being occupied by four men, the dormitory being approximately 100 feet long and facing the Atlantic Ocean, as shown on the sketch attached hereto as Exhibit "A", the dormitories being marked "5" on the Exhibit.

7. At the Base there was also a recreation center for the employees known as the "Reef Club". (On Exhibit "A", this is labeled the "Subsistence Building").

8. The town is Cockburn Town, which has native clubs in a section known as Victoria Hills, where PAA men were commonly known to go for beer. One of the native clubs is the "Blue Marlin Club". Cockburn Town is predominantly Negro, there being very few White people on San Salvador.

9. Pan American, for the use of powerhouse employees in going back and forth to some of the more re-

mote diesel operations (the powerhouse on the Base is only one of several diesel operated electric generating plants), has one jeep. The use of this jeep for personal missions by employees is forbidden by Pan American. The jeep in question was assigned to the powerhouse and was checked out to Mr. E. Wells, powerhouse superviser, on a daily basis.

10. The powerhouse superviser, Mr. E. Wells, some three or four days prior to April 24, 1958, had warned Smith and Norman, two of the powerhouse employees, that the powerhouse jeep was not to be used for anything except official business.

11. On April 24, 1958, FRANK J. GONDECK reported for work as usual at 0800, worked his regular eight-hour shift, and went off duty at 1600 hours. He, together with some other employees, went to the "Reef Club", and there about eight or nine of the civilian employees sat around drinking champagne. The employees drinking were, specifically, Fox F. Fry, Frank Gondeck, James F. Norman, and R. M. Smith. The Superviser, Wells, was asked by Fry to join them and have a glass of champagne, which he did. Wells then went to the mess hall, had dinner, then went to his quarters and cleaned up. About 1730 hours he started to a movie on the Base and stopped by the "Reef Club" to have a beer. At that time, the same men were there sitting at the same tables drinking. Wells had a beer and then started for the movie. He went to the movie but did not stay long, left the movie and returned to his quarters. He was in his quarters when informed about the wreck. If produced as a witness, he would further state that he did not know that the men

were going to use the jeep and that no permission had been given to them to use the jeep.

12. James F. Norman, civilian powerhouse operator, if produced as a witness, would testify as follows:

"On 24 April 1958, I used the powerhouse jeep, and accompanied by Fry, Smith, and Gondeck, other powerhouse operator, proceeded to a native village about three miles from the Base. We stopped at a local beer place and ordered one beer. We spent about fifteen minutes at this beer place. At this time we proceeded toward San Salvador AFB. The native at the beer place asked us for a ride (I do not know his name). The native said that he worked at the Base. He then got into the jeep. As we approached the Base, I believe the wheels hit a hole in the road and caused the wheel to jerk to the left. I then jerked them to the right and this caused the jeep to skid, and I was thrown out of the jeep. I judge the speed of the jeep was about 30 miles per hour. The jeep is checked out permanently to the powerhouse and it is used by the personnel of the powerhouse to change watches at the three different powerhouses. The jeep was being used at the time of the accident for personal use. Before leaving the Base, we had been drinking, but not to excess. I am familiar with instructions that natives are not allowed to ride in PAA vehicles if they are not employed at the Base. After Smith verified the native's being employed at the Base, he was allowed to ride in the jeep. I cannot explain what

caused the jeep to go into the skid, as it happened so fast and I know the front end of the jeep has been bad for a long time. The Base maintenance section knows the jeep had a bad front end."

13. Fox F. Fry, civilian powerhouse operator, if produced as a witness, would testify as follows:

"I was involved in an accident with a ¼ ton jeep near the entrance to the Base. I was at the Base Club at about 1700 hours, had a beer, went to the mess hall, had chow, and talked with other powerhouse operators until time for the mess hall to be closed. I then went back into the Club where I had some more beer, continued talking to the others. Meanwhile, we left the Club, continued talking, and proceeded to the main powerhouse. About 1930 hours, Smith, Gondeck, myself, and Norman, driving, took the PAA ¼ ton jeep assigned to the powerhouse, proceeded to a native village located about three miles from the Base. We spent about fifteen minutes having a beer at a native beer place. We left the beer place to return to the Base. The native (I do not know his name) came out of the beer place with Smith and loaded into the jeep. After leaving the beer place with Norman driving, we proceeded toward the Base, at a rate of about 30 or 35 miles per hour. Just before reaching the entrance gate, the jeep seemed to go to the left and then skid to the right. I remember the chrome from the jeep being thrown from the jeep. I got up in a daze and walked to the

powerhouse and informed the operator of the accident. Then I passed out. I have no knowledge of the reason the native was riding in the jeep. All of the U. S. occupants of the jeep had been drinking, but not to excess."

14. Attached is a sketch, Exhibit "B", showing where the vehicle overturned. PAA Investigator, L. E. Bail, if produced as a witness, would testify that he examined the road at the scene of the accident on April 28, 1958, after ascertaining that there had been no changes in the highway since the accident of April 24th, and found that the vehicle was traveling Southwest and when at a point 147 feet Northeast of the gate, the vehicle went into a skid which lasted for 82 feet, 9 inches, to the point of overturn; the skid marks and dragging after the overturn indicated that the vehicle turned over one and one-half times and came to rest on its left side, 65 feet from the point of the original overturn; the physical evidence indicated continuous acceleration while the jeep was in the skid.

15. The accident occurred at approximately 2005 hours. R. M. Smith was dead when help arrived at the scene. Gondeck, Norman, Fry, and the native, R. Lightbourne, were flown from the Base for medical attention; Lightbourne to Nassau, Bahamas, and Gondeck and the others first to Patrick Air Force Base, then to Orlando, Florida, where, on April 27, 1958, Gondeck died of the injuries he had suffered in the overturn, as per a certified copy of the Death Certificate attached hereto as Exhibit "C".

16. At the time of his death, Gondeck left surviving

and dependent upon him a widow, Jeanette E. Gondeck, and a daughter, Barbara Ann Gondeck. The daughter's birthdate is August 29, 1940.

Respectfully submitted,

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